A. -- each entry. No, I wouldn't know that.
Q. And you're not the custodian of the records, are you, with respect to this document?
A. Not personally I'm not.
Q. Okay. You didn't receive any regular statements from your attorneys in connection with the bankruptcy case, did you?
A. No.
Q. Okay. It was just intermittent requests for information. Is that correct?
A. You're right.
MR. JUBBER: Your Honor, we would just renew our objection.
THE COURT: Based on what? Hearsay?
MR. JUBBER: Hearsay, foundation, lack of personal knowledge.
MR. AFFLECK: Your Honor, the Trustee would simply ask the Court to receive the document as the best evidence that there is of the fees and costs that have been incurred in this case and to accept, if it does not qualify under any other hearsay exception, under Rule 807 where other indicia for liability are shown, which is that the Trustee's counsel would not give the Trustee a bill that was false for any reason.
Alternatively, Your Honor, we can if the -- if Your

Honor wishes, we can put on testimony of Mr. Millar and myself as to the hours incurred in this case, and we would proffer -- I would proffer now my testimony and Mr. Millar's --

THE COURT: Well, wait. Wait. Wait. I'm going to sustain the objection on hearsay grounds. Do you have other questions of Mr. Bird?

DIRECT EXAMINATION (Resumed) +

BY MR. AFFLECK:

Q. Do you believe that the fees incurred in this case are reasonable?

A. Yes.

Q. No further questions.

THE COURT: Cross Examination?

CROSS EXAMINATION +

BY MR. JUBBER:

Q. Mr. Bird, you were not involved with the -- in any way with the loan that is the subject of this adversary proceeding, were you?

A. Pardon? I didn't understand your question.

Q. You were not involved in any way with the loan which is the subject of this -- this adver --

A. I was not.

Q. You were appointed as the Trustee in this case in December of 2006. Is that not correct?

A. Correct.
Q. Okay. So you've been the Trustee for approximately three years?
A. Yes.
Q. Okay. Isn't it true that you've never been or seen the property located at 2580 Bear Hollow Drive in Park City? Is that true?
A. It is true.
Q. Okay. You're not familiar with the property at all?
A. Other than the information I've received through my counsel.
Q. Okay. But you never inspected the property?
A. I have never inspected the property.
Q. And you've never listed the property for sale through a realtor. Isn't that true?
A. That is true.
Q. That you have not. Is that right?
A. Correct.
Q. Okay. You've never -- you've never filed a or had your counsel or you file a motion to retain a realtor in this case to sell the property?
A. No.
Q. And you've not spoken directly to any real estate professionals regarding the property. Isn't that true?

A. Personally I have not spoken with the professionals that we've -- we've inquired of, no.

Q. And during the past three years since you've been the Trustee, you've never asked the Debtor Brian Kitts to pay any rent for the use of the property, have you?

A. No.

MR. AFFLECK: Objection. Relevance.

THE COURT: What fact are you trying to prove?

MR. JUBBER: Your Honor, the fact that Mr. Kitts has not paid anything for the use of the property as there's been no payment by Mr. Kitts at all during the course of --

THE COURT: All right. And what fact does that prove in relation to this --

MR. JUBBER: It goes to --

THE COURT: -- ligigation?

MR. JUBBER: It goes to the damages, Your Honor, Mr. Kitts in 1640(a)(4), and what he has paid during the course of this -- with respect to this loan.

THE COURT: All right. The objection's overruled.

Q. (BY MR. JUBBER). You've not collected any rent, have you?

A. No.

Q. Okay. At the First Meeting of Creditors in this case, you made a demand on Mr. Kitts to turn over receivables owed to the Debtor by NevWest. Isn't that true?

A. Yes.

MR. AFFLECK: Objection. Relevance.

MR. JUBBER: Your Honor, it goes to he -- it goes to the fact that there were set other corporations. We've heard testimony about NevWest and what actions been taken with respect to the collection of that NevWest receivable.

THE COURT: And -- and what issue is that related to in this case?

MR. JUBBER: It goes to the issue of the separateness of these entities and -- which is an issue with respect to this property as well, the property that's at issue.

MR. AFFLECK: And I would submit, Your Honor, that with respect to NevWest, it's not an issue. The Trustee has stipulated that the money that went to NevWest out of the closing was a business expense.

THE COURT: The objection's overruled.

MR. JUBBER: Okay.

Q. Have you ever made any demands on the Debtor for turnover of any money or property?

A. Yes.

Q. And what would -- what demands were they?

A. Well, I believe that at the creditors' meeting there were some requests for turnover, and I believe my counsel has had -- had communications with the Debtor. I had not made any other personal demands upon the Debtor.

Q. Okay. Prince Yeates & Geldzahler is special counsel. Is that correct?
A. Pardon?
Q. Prince Yeates & Geldzahler --
A. Correct.
Q. -- is special counsel?
So the counsel you're speaking of would not be Prince Yeates & Geldzahler. Is that correct?
A. It would be Prince Yeates.
Q. Okay. The 341 meeting would have been held sometime approximately January of 2007. Is that correct?
A. I don't recall.
Q. Approximately shortly after the -- your appointment --
A. Correct.
Q. -- as the Trustee?
A. I don't recall the exact date.
Q. And isn't it true that in early June of 2008, you received a hundred thousand dollars from the Debtor Mr. Kitts?
A. Correct.
Q. Okay. And those funds came out of the blue without any prior negotiation or discussion. Isn't that true?
A. That is correct.

Q. Okay. And isn't it true on the same day you received a hundred thousand dollars, you filed a Notice of Intent to abandon the property as well as this adversary proceeding against Winterfox, didn't you?

A. That's correct.

Q. And you subsequently withdrew that notice of intent. Isn't that true?

A. That's correct.

Q. And the allegation that you stated was that the -- these assets were burdensome to the Estate and of inconsequential value. Isn't that true?

A. At the time that those negotiations were taking place, that would have been sufficient funds to pay all creditors in full, in our view.

Q. But the statement that was made was that it was of inconsequential value and burdensome to the Estate. Isn't that true?

A. Correct.

Q. And you never conducted any investigation with respect to that hundred thousand dollar payment that came out of the blue, didn't you?

A. We requested information as to the -- what those funds were to represent.

Q. Okay. But do you believe that the amount that was sufficient to compensate the Estate for any cash assets that the Debtor might need -- might need that any -- excuse me. Let me restate that. You believe that the amount was sufficient to compensate the Estate for any cash assets that the Debtor might need to turn over. Isn't that true?

A. I don't know that we ever made a determination of that. We believe that the funds that were turned over were sufficient to pay creditors in full. There was no need to make a further investigation at that point.

Q. But isn't it true that you testified -- or isn't it true that you believed that the amount of a hundred thousand dollars was sufficient to compensate the Estate for any cash assets that the Debtor might need to turn over?

A. I think I just answered that question. We didn't make a determination whether that -- whether there were any additional cash assets that should be turned over to the Estate. We simply received the money that the Debtor paid to us.

MR. JUBBER: Your Honor, may I -- may I approach?

THE COURT: You may. This is Mr. Bird's deposition of April 30th, 2009. And there are no corrections.

MR. JUBBER: Thank you, Your Honor. May I give a copy to the witness?

THE COURT: You may.

Q. (BY MR. JUBBER) Mr. Bird, I would turn your attention to page 48 of your deposition. Excuse me.

May I have a moment, Your Honor?

THE COURT: You may. Do you need a recess, Counsel?

MR. JUBBER: Your Honor, I think I -- I think I found it. I was looking at the wrong document. I apologize.

THE COURT: All right.

Q. (BY MR. JUBBER) I call your attention to page 48 of your deposition, Mr. Bird, beginning at line 21.

A. All right.

Q. And I'll read the first question if you would. Isn't it -- question, line 21. "But you have not done any investigation; this is a hundred thousand dollars, just a nice, round number" --

MR. AFFLECK: Objection. Relevance.

MR. JUBBER: Your Honor, I believe the witness already testified about the hundred thousand dollars, and this is just clarification with regard to -- with regard to that, what the number -- what the receipt was for.

THE COURT: All right. The objection's overruled.

Q. (BY MR. JUBBER) Your answer, sir, on page 23 -- line 23.

"A Yeah.

"Q Do you believe that that satisfies any further inquiry on your part as to whether or not there, perhaps, are other cash assets out there?"

Would you read lines 2 to 4, please.

"A I believe the amount was sufficiently large to persuade us that it more than compensated the Estate for any cash assets that we were aware of."

Q. So you believe that the -- the amount was sufficiently large to compensate the Estate for any cash assets that the Debtor needed to turn over. Isn't that correct?

A. That we were aware of at that time.

Q. All right. You never brought any motion for Court approval of any settlement in connection with your receipt of that hundred thousand dollars, did you?

A. It was not a settlement.

Q. Okay. You're aware, Mr. Bird, are you not, that there was a lot, lot 24, that was transferred by Sun Peak to Life Force Fitness the same day that Mr. Kitts filed his bankruptcy petition? Isn't that true?

A. Yes.

Q. And you're aware, are you not, that lot 24 was sold later that same year? Isn't that true?

A. Correct.

Q. And the Bankruptcy Estate did not receive any of that money, did it?

A. No.

Q. Have you ever made any demand upon Life Force

Fitness or its principals, Mr. or Mrs. Kitts, to turn over those funds?
A. Yes.
Q. Have they ever turned over any of those funds?
A. No.
Q. How much did you make a demand for?
A. I -- I don't recall whether it was a monetary amount or whether we simply had informed them that we believed that that was a transfer that could be set aside.
Q. Okay. Did you ever file an action to set it aside or to recover the funds?
A. Not to this point.
Q. You have not filed that, and that was more than three years ago. Is that right? You've been -- you've been appointed now for three years?
A. Whatever it is.
Q. Is the statute of limitations now passed with respect to that claim?
A. We don't believe so.
Q. And why is that?
A. We believe the statute of limitations may have been toled.
Q. On what basis?
A. That we were not -- we were not aware of the transfer at the time that the case was filed, nor was it

disclosed in the bankruptcy that the transfer was -- was -- had been made, nor did Mr. Kitts took a position that those were his personal funds and not -- not funds that belonged to a separate corporation.

Q. When did you become aware?

A. I don't know the -- I became aware of that very recently. I don't know when my counsel first knew of that.

Q. Is it not correct that those -- it was disclosed in the Chapter 11 filings, in the Chapter 11 papers?

A. The transfer?

Q. Correct.

A. I -- I don't recall.

MR. JUBBER: Thank you, Your Honor.

REDIRECT EXAMINATION +

BY MR. AFFLECK:

Q. Mr. Bird, last Fall -- or Winterfox's counsel has asked you about a Notice of Abandonment that you filed.

A. Correct.

Q. And clarify for the Court, if you would, the reason why you filed that Notice of Abandonment again.

A. Well, we had received funds that were sufficient to pay all creditors in full, and based on the receipt of those funds, we didn't see a necessity of pursuing this litigation or liquidating any further actions.

Q. And had you done a claims analysis at that point?

A. We had.
Q. And had you also looked at administrative -- potential administrative expenses of the Estate?
A. Yes.
Q. So the hundred thousand dollars would have been sufficient to pay all -- or, essentially, all of those claims. Is that right?
A. Yes.
Q. And that's why you determined to abandon the home which was encumbered by Winterfox's lien and the TILA -- the TILA litigation that had originally been brought by the Debtor. Is that correct?
A. That's correct.
Q. You withdrew that Notice of Abandonment, didn't you?
A. Yes.
Q. Why?
A. An objection had been filed by an entity known as JSH Holdings asserting that if certain claims had been made in this litigation were accepted by the Court, that there was a possibility that Winterfox would have a very large unsecured claim. If we abandoned the litigation and the property, it may be that -- that there would -- that if that claim were allowed, that there wouldn't be sufficient funds to pay our claims in full.

Q. So JSH wanted you to continue the litigation?
A. Or dismiss it with prejudice. Correct.
Q. And did you understand that JSH was an independent third-party creditor?
A. At that time we believed they were.
Q. And based on that belief, you did decide to withdraw the Notice of Abandonment?
A. Yes.
Q. And JSH was -- what was -- do you remember the amount of that claim?
A. It was approximately $50,000.
Q. Was that the largest unsecured claim in the Estate?
A. I believe so.
Q. And what did you later find out about JSH Holdings?
A. That JSH Holdings was -- that the JSH Holdings claim, the purchase of that claim was funded by Winterfox.
Q. And did you -- how did you find that out?
A. I believe we received information in discovery that provided that information.
Q. And do you know what type of a loan it was? Secured loan? Recourse? Non-recourse?
A. I think it was a non-recourse loan.
Q. And what does that mean?

A. Well, if -- if the funds were recovered from the Estate, they would go to pay off the loan, but -- but, otherwise, there would be no personal liability of JSH Holdings to Winterfox.

Q. So if JSH did not receive a distribution, it was not required to pay back the loan to Winterfox. Is that right?

A. Yes.

MR. JUBBER: Objection. Foundation. The witness' lack of personal knowledge regarding the transactions.

THE COURT: Sustained.

Q. (BY MR. AFFLECK) Did you review the discovery that had been given by Winterfox, the document that had been given by Winterfox, and discuss it with your counsel?

A. Yes.

Q. And do you have a foundation as to what the basis or what the terms of the Winterfox loan to JSH Holdings was?

A. Based on those --

MR. JUBBER: Objection, Your Honor. This witness is not qualified. The documents are not before the Court. Lack of foundation. Hearsay.

THE COURT: The objection's overruled.

Q. (BY MR. AFFLECK) And so you -- you looked at those documents and you discussed it with your counsel, and you determined from that the meaning of the documents which

you've testified to today?
A. Yes.
Q. And you're also an attorney. Right?
A. I am.
Q. So if JSH did not receive a distribution under this Chapter 7 case, JSH had no liability to pay Winterfox back on the loan that it gave to JSH to purchase the claim in the first place. Right?
A. I believe that's true.
Q. Now, if you had known this fact -- now, was this fact disclosed to you at the time that JSH filed the objection to your abandonment?
A. No.
Q. If you had known this fact, would it have changed your decision whether to go forward with that abandonment or to withdraw it?
A. It may have.
Q. Now, as to this question about lot 24, this is the property that is next to the Debtor's home. Isn't it true that you learned about the Debtor's position that property titled in Sun Peak was actually the Debtor's property in the context of this trial?
A. That's correct.
MR. AFFLECK: No further questions, Your Honor.

RECROSS EXAMINATION +

BY MR. JUBBER:

Q. Mr. Bird, in your view, what are the unsecured claims in this -- in this case?

A. Well, I believe the claim -- the current claims, other than the claim of Winterfox, are about $50,000.

Q. Okay. And at the time you testified at your deposition in April you believed, did you not, that this was a solvent Estate. Isn't that true?

A. Yes.

Q. Okay. You believed that there were sufficient assets in the Estate to pay all claims in full?

A. Correct.

Q. Okay. And in making that statement back in April, did you take into account accrued fees of your professionals?

A. I don't know that I knew the precise numbers at that point.

Q. Okay. And you've received -- you testified earlier that you received the disclosures with respect to your professionals' fees and so forth in July and August and so forth. Isn't that true?

A. Yes.

Q. Okay. Have you -- have you reviewed those fees truly?

A. Pardon?

Q. Have you looked at those fees? Have you added them up?
A. No.
Q. Okay. Isn't it true that there was over $110,000 of accrued attorneys' fees by the end of March of 2009?
A. I wouldn't dispute that.
Q. You wouldn't dispute that?
A. No.
Q. So, in fact, by April in your deposition, in fact, there was already $110,000 of attorneys' fees. Isn't that true.
A. Correct.
Q. And you only had a hundred thousand dollars in the Estate. Isn't that true?
A. It's true.
Q. But the Complaint in this adversary proceeding made a claim for rescission. Isn't that true?
A. It did.
Q. Okay. And that claim was dismissed with prejudice in June of this year. Isn't that true?
A. Yes.
Q. Okay. And the Complaint also made a claim under the Utah Consumer Credit Code. Isn't that true?
A. Yes.
Q. And that claim was dismissed with prejudice in

June of this year as well, was it not?
A. I think so.
Q. And the Complaint also included a claim for misrepresentation. Isn't that true?
A. Yes.
Q. And that claim was dismissed with prejudice as well. Isn't that true?
A. Yes.
Q. Okay. So isn't it true, Mr. Bird, that a significant amount of the work that you testified to before was for work done on claims that were subsequently dismissed? Isn't that true? Attorneys' fees. Excuse me.
A. I think that's a misrepresentation. Those -- those claims were dismissed in conjunction with discovery and strategic decisions made by the Trustee and their counsel as to how to proceed. That doesn't necessarily mean that the fees that were incurred in pursuing those claims were not of value to the Estate and weren't reasonably and necessarily incurred.
Q. But they preceded the -- the dismissal took place in June. Correct?
A. Yes.
Q. Of those claims? And the work that you're -- a significant portion of the work that is listed on the -- on the document was actually done prior to that. Is that not

correct?
A. Yes.
Q. Okay. And you don't know how much was related to those claims that were dismissed, do you?
A. I don't particularly.
Q. Thank you.
THE COURT: Mr. Affleck, anything further?
MR. AFFLECK: No further questions.
THE COURT: Sir, you may step down.
THE WITNESS: Thank you.
MR. AFFLECK: May Mr. Bird be excused, Your Honor?
THE COURT: Is there any objection?
MR. JUBBER: None, Your Honor.
THE COURT: All right. He may.
MR. AFFLECK: Your Honor, at this juncture, I would proffer the testimony of myself and Mr. Aaron Millar regarding the document that was handed to Mr. Bird and proposed to be received as an exhibit in this case to overcome the hearsay objection regarding the description of the fees, description of the time and the amount of time -- or the description of what was done and the amount of time that was spent on those matters.
THE COURT: All right. Counsel, you may proffer subject to Cross Examination, but one at a time.
MR. JUBBER: Your Honor, may we interpose an objection.

There is -- on the witness list that was sent to us, there's no indication of any witness -- any testimony that's going to be offered by either Mr. Affleck or Mr. Millar.

MR. AFFLECK: And I would request that the Court allow the Trustee to amend his witness list to -- for the purpose of providing foundation for the document that Mr. Bird relied upon in his testimony for the assistance, primarily, of the Court in determining the reasonableness of the fees that Mr. Bird testified to.

THE COURT: I'll allow that modification.

MR. JUBBER: I'm sorry, Your Honor?

THE COURT: I'm allowing them to proffer the testimony. Are you going to?

MR. AFFLECK: Thank you, Your Honor, yes. I proffer my testimony that the descriptions are true and accurate to the best of my ability to describe them. They show the time period incurred in tenths of an hour, and that they were the -- they were prepared in a schedule for Mr. Bird and delivered to him so that he could review the amount of fees and costs that have been incurred in this case.

THE COURT: Are there objections to the proffer or desire to cross examine?

MR. JUBBER: Yes, Your Honor.

THE COURT: All right. Would you come forward and be sworn.

Mr. Jubber, I'll take the proffer as Direct.

THE CLERK: Come stand here, please.

THE COURT: Mr. Affleck --

THE CLERK: Mr. Affleck.

THE COURT: -- you need to be sworn.

(Mr. Affleck is sworn.)

THE CLERK: Please take the witness stand and state your name for the record.

THE WITNESS: Adam Stephen Affleck. A-d-a-m, S-t-e-p-h-e-n, A-f-f-l-e-c-k.

CROSS EXAMINATION +

BY MR. JUBBER:

Q. Mr. Affleck, you've acted as special counsel in this case. Is that right?

A. That's correct, Mr. Jubber.

Q. And you've submitted this document and updated it last night?

A. This is a document that I provided to Mr. Bird so that he could prepare for his testimony today. It is a document that was provided to Winterfox, Winterfox's counsel, by me last night by e-mail after it was prepared. It updates --

Q. Mr. Affleck, just you updated it last night. Is that correct?

A. Saturday and Sunday, yes.

Q. Isn't it true, Mr. Affleck, that there were claims that were dismissed in this case in June of 2009? Isn't that correct?

A. I believe that is correct.

Q. Okay. And isn't is true, Mr. Affleck, that a significant portion of the fees listed in this document relate to claims that were dismissed in June of 2009? Isn't that true?

A. No, that is not true.

Q. Do you -- do some of the amounts, some portion of it relate to those claims?

A. I suppose that you could say that a very small portion might be attributable, for example, to the misrepresentation claim.

Q. The UCCC claim?

A. The UCCC claim, these claims were claims that were asserted by Mr. Kitts, and upon review of the facts and the law relating to those claims, the Trustee determined early on that they had little merit and did not justify incurring significant fees to prosecute those.

Q. Okay. Well --

A. As far as the descriptions and -- and what went on in the case and what was the focus of the case, it was the Truth In Lending Act and the facts. The rescission claim is simply a remedy for the TILA violation.

Q. Okay. But the rescission claim was asserted, was it not?
A. The rescission remedy was asserted, yes.
Q. Okay. And the -- okay. And the rescission remedy was dropped?
A. That's correct.
Q. Okay. And a significant portion of the claim related to rescission. Is that not correct? Or the work.
A. No. The work related to discovering facts, researching law relating to TILA violations. If there is a TILA violation, there are a number of remedies.
Q. Just -- it related to the rescission claim, did it not, Mr. Affleck?
A. No. That's what I'm trying to explain. That the -- the fact of the TILA violation allows for many remedies, including rescission, actual damages, statutory damages, attorney's fees and finance charges. Based on the discovery done by the Trustee, it was determined that the rescission claim was not a claim that was worth spending a lot of money on, and so that claim was dropped.
Q. And that was done in June of 2009. Isn't that correct?
A. That's correct. But to say --
Q. Approximately six months ago, five months ago?
A. I think it was earlier than that, actually, but

I'd have to look at the court docket to see.
Q. I believe the court docket -- call your attention to Exhibit -- if I was to represent that was done in June of this year, would you disagree with that?
A. Whatever the record says, I would agree with.
Q. And so the Truth In Lending claim included claims for rescission as well as damages, did it not?
A. The Truth In Lending violation is what we spent a lot of time trying to prove.
Q. Okay.
A. As to the remedies relating to that, the Trustee determined early on that rescission was not a remedy that --
Q. But --
A. -- he intended to pursue.
Q. But during the discovery that was done in the Fall of this year, rescission was still a claim that was being asserted, was it not?
A. Yes.
Q. Okay.
A. But I would -- but I would add that the work that was done --
Q. Just yes or no, Mr. Affleck. Was it a claim that was being asserted in the -- in the Spring of the year when the depositions were done?
A. I don't think so. I think that it became very

clear to all parties involved that the Trustee did not intend to pursue a rescission claim when the Trustee filed or attempted to file an amended and supplemental Complaint where that claim and the misrepresentation claim were taken out, and that was before any discovery in this case.

Q. Isn't it true that Mr. Bird's deposition was taken in April of this year?

A. If that's when it was, I'll take your word for it.

Q. Okay. And -- and that was prior to the rescission claim being dropped. Isn't that true?

A. I think it was after. I think that -- you'll have to look at the date that we made our motion to file our Amended Complaint. In the Amended Complaint I believe it was fairly clear that we were not pursuing the rescission claim or the UCCC claim.

Q. And isn't it true, Mr. Affleck, that that Amended Complaint was -- was struck by the Court?

A. Yes, it was struck. The Amended Complaint, we had filed a motion to approve the Amended Complaint. The Court allowed -- ordered that the Amended Complaint could be filed. An Order was submitted that was signed off by Winterfox's counsel which included a copy of the Amended Complaint, and then for -- well, the fact is the Amended Complaint was not -- was not actually physically filed, and Winterfox complained that because of that, they were not able to file a Motion For Summary Judgment as to the second Claim For Relief that was brought in that Amended Complaint, and the court struck it, yes. That's my recollection.

Q. That's all I have. Thank you.

THE COURT: All right. Is there anything further of this witness?

MR. MILLAR: Nothing further, Your Honor.

THE COURT: Sir, you may step down.

MR. AFFLECK: Your Honor, I would also proffer the testimony of Aaron Millar and Nancy Perschon who are in court. Well, let's start with Aaron Millar. That these statements of his time and the hours spent are true and accurate to the best of his knowledge, and that he assisted in preparing this for use by the Trustee and use by the Court to determine the reasonableness of fees in this case.

THE COURT: Does that conclude the proffer?

MR. AFFLECK: Yes, Your Honor.

THE COURT: Are there any objections to the proffer --

MR. JUBBER: Yes, Your Honor.

THE COURT: -- or desire to cross examine? Do you object that that is what --

MR. JUBBER: Yes. We --

THE COURT: -- Mr. Millar's testimony would be if called?

MR. JUBBER: We -- we would ask for the right to cross

examine.
THE COURT: All right. The proffer's accepted on Direct.
Sir, would you come forward and be sworn.
(Mr. Millar is sworn.)
THE CLERK: Please take the witness stand and state your name for the record.
THE WITNESS: Aaron Bruce Millar.

CROSS EXAMINATION +

BY MR. JUBBER:
Q. Mr. Millar, you've been involved in this case for some months. Is that not correct?
A. That's correct.
Q. Do you recall when you became involved?
A. My recollection is November of 2008.
Q. Okay. How much time did you spend researching the rescission claim in this case?
A. My recollection is it would be within three to six hours.
Q. And you don't -- you're not sure just sitting here; you'd have to go back and look. Is that not correct?
A. That is correct.
Q. And isn't it true that you did spend time doing that, did you not?
A. Yes, it is true.

Q. Okay. And did you spend time on the other claims? The misrepresentation?
A. My recollection is that I reviewed the misrepresentation claim as it was presented in a winter -- in a brief submitted by Winterfox in connection with their Motion For Summary Judgment, and that would include the sum -- the total of the amount of research that I would have for the misrepresentation claim.
Q. You also researched, did you not, the UCCC claim? Isn't that true?
A. No. That is not true.
Q. But the determination was made by someone to drop that claim. Isn't that true?
A. That is true.
Q. So there was some work done to enable one to determine that the claim had no merit. Isn't that true?
A. I have no personal knowledge as to that.
Q. But that would be reflected -- that would be reflected in these -- in these -- this outline of fees and charges. Is that not true?
A. If, in fact, there was time spent making that determination, then they would be reflected in the outline.
MR. JUBBER: Thank you, Your Honor.
MR. AFFLECK: No questions, Your Honor.
THE COURT: Sir, you may step down.

MR. AFFLECK: The Trustee would proffer the testimony of Nancy Perschon, who is in court today, that the descriptions that she -- that contain her initials NRP are also true and correct to the best of her knowledge, and indicate what she did and how much time she spent for the purpose of informing the Trustee about the fees and costs incurred in this manner -- matter for the benefit of the Trustee and for the Court.

THE COURT: Is there any objection that that would be her testimony on Direct?

MR. JUBBER: No. There's none.

THE COURT: The proffer's accepted. If you'd come forward -- do you wish to cross examine. Yes?

MR. JUBBER: Yes.

THE COURT: All right. Ma'am, if you'd be sworn, please.

(The witness is sworn.)

THE CLERK: Please take the witness stand and state your name and spell it for the record.

THE WITNESS: Nancy Perschon. N-a-n-c-y, P-e-r-s-c-h-o-n.

CROSS EXAMINATION +

BY MR. JUBBER:

Q. Ms. Perschon, how long have you been involved in the work in this case?

A. You know, it's hard to tell. I'm going to say about November of 2008, if not before. I know, like, I may have been involved before Mr. Millar.
Q. Approximately a year?
A. Uh-huh.
Q. Okay. And what kind of work did you do on the case?
A. I'm a paralegal, certified paralegal, so I would be responsible for assisting in looking at research or compiling spreadsheets, looking at amounts. Whatever paralegals do. I do a lot of different things, so it's kind of hard to pinpoint that, but --
Q. So you're looking at research. Is that fair?
A. Look -- I'm actually not looking at research. I may be asked to pull cases off of Lexus and Shepardize them which is an assistant -- a legal assistant kind of thing.
Q. Do you recall doing research with respect to rescission?
A. I don't recall doing research with respect to rescission, no.
Q. Do you recall doing research with respect to the UCCC claim?
A. I do not.
Q. Do you recall doing research with respect to the misrepresentation claim?

A. I do not.
Q. You testified that your other work was basically in support. Is that correct?
A. I am a support to Mr. Millar and to Mr. Affleck, yes.
Q. I have nothing further.
THE COURT: Anything further?
MR. AFFLECK: No, Your Honor.
THE COURT: Ma'am, you may step down.
MR. AFFLECK: Your Honor, I would note that there are a few entries by other members of our firm, but they are minimal. I would ask the Court at this time to receive this proposed exhibit that was used by Mr. Bird in his testimony as evidence in this case.
THE COURT: And is it Trustee's 80?
MR. AFFLECK: Yes.
MR. JUBBER: Your Honor, objection. Same objections as we noted before.
THE COURT: All right. The objection's overruled. Exhibit 80+ is received.
MR. AFFLECK: May I approach the Bench, Your Honor?
THE COURT: You may. This is the original, right? Okay.
MR. AFFLECK: Your Honor, the Trustee would call Marco Fields; and if the Court would, may we have a five-minute

break before we begin that?

THE COURT: All right. We'll be in brief recess.

(Recess taken from 10:38 a.m. 10:50 a.m.)

MR. AFFLECK: Trustee calls Marco Fields.

THE COURT: Ma'am, would you come forward and be sworn, please.

(The witness is sworn.)

THE CLERK: Please take the witness stand and state your name and spell it for the record.

THE WITNESS: Marco Fields. M-a-r-c-o, F-i-e-l-d-s.

DIRECT EXAMINATION +

BY MR. AFFLECK:

Q. Ms. Fields, you've been in the mortgage industry since approximately 1992. Is that right?

A. Correct.

Q. And did you work at Citywide from 2001 to 2005 as a loan officer?

A. Approximately, yes.

Q. And did you originate loans at Citywide?

A. I did.

Q. And did you arrange and negotiate loans and bring borrowers and lenders together at Citywide?

A. I did.

Q. During 2003 through 2004, did you assist Winterfox in originating private or hard-money loans?

A. I did.
MS. BOULEY: Objection. Calls for a legal conclusion.
THE COURT: The objection's overruled.
Q. (BY MR. AFFLECK) Did you assist -- in working with Winterfox, did you assist Winterfox in evaluating things like credit risk?
A. Give me a definition of credit risk.
Q. Maybe exit strategy, how Winterfox --
A. The ability for the -- for the money to be paid back.
Q. Right.
A. That was what I did.
Q. Okay. So --
A. I just want to be careful as far as -- as far as your what your participate or what your --
Q. Sure. The --
A. Excuse me.
-- understanding is.
Q. The tape won't show when you're nodding your head up and down, so you have to say yes or no.
A. Okay.
Q. And did you assist at times in the documentation of those loans for Winterfox?
A. Yes.
Q. And did you assist in regulatory compliance?

A. No.
Q. Is that something you did with Citywide?
A. Yes.
Q. You've heard of Brian Kitts, of course. Right?
A. Yes, sir.
Q. Did you assist Aaron Olivarez in putting together a loan from Winterfox to Brian Kitts?
A. Yes.
Q. What was your role?
A. I had evaluated the documentation that we had been given to determine if it was a -- if it was a transaction that once the money was lent out, if the money could, in fact, be paid back.
Q. In the process of putting the loan together, did you ever speak with Brian Kitts personally?
A. No.
Q. So you got your information from third parties? Aaron Olivarez?
A. Correct.
Q. Deer Creek Title?
A. Yes. Yes.
Q. Michael Falk?
A. Yes. No. Let me -- let me amend that. I did not speak to Michael Falk during the origination process.
Q. So you spoke with Aaron Olivarez and personnel at

Deer Creek Title?
A. And Liz at Deer Creek Title.
Q. Okay. And do you know Liz's last name?
A. I do not off the top of my head, but I'm sure it's in documentation that we have.
Q. Okay.
A. Tyler? That's her name?
Q. One of your responsibilities in connection with the Winterfox loan was to prepare notices and disclosures to Mr. Kitts. Isn't that right?
A. No.
Q. Did you prepare notices and disclosures?
A. I did.
Q. Would you look at Exhibits 7 and 8.
A. Is it in here? I'm sorry.
MR. AFFLECK: May I approach the witness, Your Honor.
THE COURT: You may.
THE WITNESS: Is that it? Okay. Got you.
Q. (BY MR. AFFLECK) I'll represent to you that the documents behind tab 7 and tab 8 are the documents that Winterfox has testified in its responses to discovery are the notices and disclosures that were sent by Winterfox to the Debtor in December 2004. These documents -- are these documents that were prepared by you?
A. The -- the HUD settlement statement was not. That

would have been prepared by the title company.
Q. That's the first page of Exhibit 7?
A. The first several pages.
Q. Okay. Would that go from Winterfox 1 to Winterfox 7?
A. To -- I'm sorry. Just a moment. Winterfox 7 is also title company disclosure or title company document.
Q. Okay. So beginning at Winterfox 8, which is the Good Faith Estimate and continuing to Winterfox 17, are these documents that you would --
A. These are documents that I would have prepared.
Q. Okay. And you prepared these for Winterfox?
A. Um --
Q. Or in connection with the Winterfox loan?
A. Correct.
Q. And on the bottom of these documents there is a mailed stamp.
A. Yes.
Q. With handwriting on the mailed stamp. Is that your handwriting?
A. I am assuming so.
Q. Okay. Do you recall in your deposition testifying that that was your handwriting --
A. Yes, sir, I do.
Q. -- and that you had mailed these and stamped it

and put the date on it?
A. Yes, sir. I'm -- I'm assuming because these are what was in my file.
Q. Now, where did you -- where did you send these disclosures and notices?
A. If they would have been sent, they would have been sent to the address that we had for Brian Kitts.
Q. And that was his home residence?
A. That was a 2580 Bear Hollow Drive.
Q. Okay. You would not have used a P.O. Box?
A. The reason that I remember sending something to Brian is because we had another client in Park City, and so I remember having -- they both had Bear in the address, so I remember clarifying what address. So I believe that they would have been sent to a 2580 Bear Hollow.
Q. Okay. The loans in these case -- in this case, there were two loans. You recall that. Right?
A. Yes.
Q. One was on December 8th, and the other was on, I think, December 31st. These disclosures on the mailed statement, it indicates a mailing date under Exhibit 7 of 12-5-05.
A. Correct.
Q. Now, in your deposition testimony you testified that the '05 was a mistake, that, actually, it was -- it

should have read '04. Is that right?

A. If that's what I had testified to, then yes. The dates -- the dates are incorrect.

Q. Okay. So you sent these on -- in December 2004. Right?

A. I don't know when I sent these. I know that this is what the stamp indicates when they were mailed. I don't have recollection of doing these, putting them into a mail pouch and sending them.

Q. Do you recall testifying in your deposition that your recollection was that they were mailed on 12-5? For example, this says 12-5-05.

A. I'm making -- I'm making an assumption, sir, yes. That's what -- if that's what it says, then I'm assuming that's when it would have been mailed.

Q. It would have been 12-5-04 instead of 12-5-05?

A. I'm sorry, could you repeat the question.

Q. Did you fill out the mailed stamp when you sent -- on the date that you sent these?

A. I don't recall.

Q. Could you have filled out the mailed stamp before you mailed them? I mean --

A. Yes.

Q. Okay. So did you fill out this mailed stamp before you mailed the disclosures?

A. I -- I would have.
Q. Okay. So you would have mailed these on 12-5. Is that right? You would have mailed them the same day that you have indicated that it was mailed except for the '04, '05 discrepancy?
A. I'm assuming if that's what the stamp says, that's logically would have happened -- is what -- is what would have happened. I don't have a recollection of actually doing the mailing.
Q. Do you remember -- these documents indicate that they were all mailed on the same day. Were they all -- were all of these documents prepared and mailed at about the same time?
A. I do not recall. I don't recall actually preparing the documents, so . . .
Q. Because one of the documents at Winterfox 10 says 12-5-06.
A. Correct. Yes. I understand there are -- there are date discrepancies throughout.
Q. But they were all done at the same time and mailed at the same time, or did you mail them in separate envelopes?
A. I don't recall.
Q. Do you recall in your deposition testifying that you mailed them all at the same time?

A. If that's what my deposition says, then that's --
Q. Is that your --
A. -- that was what -- that was what was indicated in my deposition.
Q. Is that your testimony or would you like to read your deposition?
A. I'd be happy to read the deposition.
Q. I'll find it for you in a moment.
A. Okay. Sure.
Q. Okay. Look at Exhibit 8, if you would.
A. 8?
Q. Yes. These are the documents that Winterfox testified were sent to Brian Kitts on -- in December 2004 relating to the second loan. Are these documents that you prepared for Winterfox?
A. These look like documents I would have prepared.
Q. And are these -- that's the mailed stamp. Is your testimony the same with respect to that mail stamp; that's your handwriting, you would have prepared and mailed them on the day that you indicated on this stamp?
A. Give me just one moment. I'm sorry. The documents indicate that -- that they were mailed on 12 either 24 or 29, so they would have needed to have -- I believe it says the 29th.
Q. Okay. So you would have prepared them on or

before the 29th and sent them on the 29th?
A. Again, these are the disclosures that were in my file, so, again, this is what the mailed stamp is -- is indicating when they were mailed. That's all that I can -- that's honestly all that I can -- can tell you.
Q. And that's your handwriting on the mailed stamp, so that's something that you wrote and that you mailed?
A. I believe -- I believe that it is. I believe that it is.
Q. All right. Now look at the -- the document that is the first page of Exhibit 8. It's the Truth In Lending disclosure statement.
A. Yes.
Q. Up at the top of that document it indicates Applicant Brian Kitts, property address, application number, and then there is a section for prepared by and date prepared. Do you know why --
A. Correct.
Q. -- those are blank?
A. Both of those are -- are fields that need to be filled in, from what I recall. Again, it's been -- it's been probably four -- some years since I've done one. Those were filed -- or fields that would need to be filled in. So if I -- if I hadn't filled them in, they wouldn't have printed off.

Q. Look at the date prepared question at the top of Winterfox No. 18.
A. Uh-huh.
Q. It appears that there is a zero there. Can you explain what that is or why it's there?
A. I cannot. It makes me question, again, if these were -- if these documents were file -- were file or file fillers that were, perhaps, put in the file, my file again. My file. I had kept these simply for my file disclosure purp -- or excuse me -- for my file purposes.
Q. And when you gathered up documents to give to Winterfox in connection with the Trustee's discovery requests, all you had were copies of these documents. Right?
A. Correct.
Q. You didn't have the originals?
A. Correct.
Q. And that's because, according to your testimony, you had sent the originals to Brian Kitts?
A. That's what I'm assuming. That's an assumption on my part.
Q. You prepared these documents to the best of your ability based on the information you had. Right?
A. Correct.
Q. And information you had included that the property

would be the primary residence of Brian Kitts. Isn't that right?
A. I don't recall. I don't recall. The primary residence box that it's checked in, if you look at --
Q. Let's look at Winterfox --
A. -- 20, page 22.
Q. Yes. Winterfox 22.
A. That's a default. It automatically defaults to that. So we'd have to go in and manually change it.
Q. So as you were preparing these, your testimony is it defaulted to primary residence; that's not something you chose?
A. My recollection is, for the years that I've done these, that that -- that that was a default.
Q. Okay. But these documents would have been documents that you reviewed, and you were careful in dotting your I's and crossing your T's. Right?
A. Obviously I wasn't careful in dotting my I's and crossing my T's because there -- the stamps have incorrect dates on them.
Q. But wasn't your testimony on the incorrect date that because the year was -- '05 was coming, that you were already in the habit of writing '05 on certain documents, and that's why the mistake was made?
A. That's what I recall.

Q. Well, that's a reasonable error, I guess. Is there any reason why you would have thought that this property was other than Mr. Kitts' primary residence?
A. I don't recall an actual conversation defining whether it was or wasn't.
Q. Okay. Did you use a Uniform Residential Loan Application in preparing these disclosures?
A. No.
Q. Now, you testified that you didn't speak with Brian Kitts or Michael Falk before the loan was made, but you did speak to Brian Kitts after the loan was made. Right?
A. Correct.
Q. Is that in person or by --
A. Over the telephone.
Q. And the purpose of your call was to encourage payment. Is that right?
A. It was to understand what we could -- what I could do to be helpful, because my conversations had been with Michael Falk, and I believed that Brian was relying heavily on Michael Falk to get him out of this loan through either a refinance or someone else purchasing the home. And we had had a very difficult time, my understanding was from Aaron Olivarez, in reaching Michael Falk. Excuse me. Yeah. In reaching Michael Falk. So my call to Brian was to -- was to

find out if I could be helpful in doing something to -- to -- what his intentions were; if he was working on other exit strategies, refinance, selling the home. And that turned into an interesting conversation.
Q. And you were doing that on behalf of Winterfox. Right?
A. Um --
Q. You were trying to collect the loan for Winterfox, not for yourself?
A. I initiated the phone call. It was not -- it was not asked -- Winterfox did not ask me to initiate that phone call.
Q. But you felt that was part of your duties to help them -- help Winterfox get this loan resolved and collected. Right?
A. I felt that in good faith I owed a follow-up call. Absolutely.
Q. Okay.
A. There were no duties defined. Winterfox and I had no duties defined as to specifically what I should or should not be doing.
Q. Did Winterfox know that you were doing it; acting on its behalf?
A. No. I don't believe -- I don't -- I don't believe so. I don't think that they were -- would have been aware

of the call prior to me making it.
Q. In the call that you made to Mr. Kitts, did you mention the possibility of recording a Deed In Lieu Of Foreclosure?
A. I don't recall.
Q. If you'll turn to page 135 -- 134 of your deposition.
Your Honor, we have supplied an unopened copy of the -- of Ms. Fields' deposition for the Court.
A. Oh. Is that -- that is this?
Q. Yes.
A. Okay.
Q. If you'll --
A. Where should I be looking?
Q. Hang on. We want to wait until the Court is ready.
A. Oh. I'm sorry.
MR. AFFLECK: Page 134, Your Honor.
THE COURT: This is Ms. Fields' deposition taken April 6th, 2009. And there are no modifications to it. All right. Which page?
MR. AFFLECK: 134.
Q. I'm going to read your testimony at line 5, the first sentence that appears at line 5.
"A And I can't say that I was -- I remained

professional, letting him know, look, that Winterfox does have a deed in lieu of -- a deed of foreclosure, Brian. You can't just ignore it. At least respond. And maybe it's not me, maybe it's not Michael Falk, but you have to look at other alternatives to have the money paid back."

Do you remember that testimony?

A. I do.

Q. Did I read that correctly?

A. Yes.

Q. And is that your testimony? Does that help you?

A. Yes, it does. Thank you.

Q. Okay.

A. I apologize. This has been a very long time.

Q. It's all right.

Now, your business at Citywide included getting conventional loans. Did it also include sub-prime loans?

A. Yes.

Q. Now, do you recall testifying that based on your evaluation of Mr. Kitts and the facts that were known to you and Winterfox at that time, that "someone" -- that Mr. Kitts was "someone who should have been able to qualify for a conventional loan?"

A. Yes. For financing. I believe so.

MR. AFFLECK: May I have just a moment, Your Honor?

THE COURT: You may.

MR. JUBBER: Your Honor, may I address this one issue earlier. You asked if Mr. Bird could be excused. We would like to have Mr. Bird not be excused if at all possible.

THE COURT: Are you going anywhere, Mr. Bird? Did you have anything you needed to do today?

MR. BIRD: I -- I'm happy to stay.

THE COURT: All right. Thank you.

MR. JUBBER: Thank you, Your Honor.

Q. (BY MR. AFFLECK) Ms. Fields, if you would turn to your deposition at page 91. Are you there, ma'am?

A. Yes.

Q. I'm going to read beginning at line 5.

"Q All right. Let's look at Exhibit 1-2."

And I'll represent to you that that is Exhibit 7 which is Winterfox document No. 9. So it's in Exhibit 7, if you'll open your exhibit book to Exhibit 7 and turn to Winterfox No. 9. So I'll begin again.

"Q All right. Let look at Exhibit 1-2
which is Exhibit 7 at Winterfox No. 9."

MS. BOULEY: Your Honor, I just want to object on hearsay.

THE COURT: Object to what? There's no -- I'm sorry.

MS. BOULEY: Is he just -- I'm not sure why he's reading from the deposition transcript.

MR. AFFLECK: Well, for two reasons, Your Honor. I'm cross examining the witness on her testimony regarding when she prepared and when she sent these notices and disclosures.

THE COURT: All right. The objection's overruled.

MR. AFFLECK: Beginning again, "All right. Let's look at Exhibit 1-2 which is Exhibit 7 at Winterfox 9."

"A (Witness complies.)

"Q What is this document?

"A That's a Truth in Lending.

"Q And did you prepare it?

"A I did.

"Q And did you prepare it on your computer?

"A Whatever -- whatever computer prepared all these documents, it all would have been prepared at once.

"Q Okay. I notice up at the top it says prepared by and date prepared are blank.

"A Right.

"Q Do you know why those are blank?

"A I'll be honest with you. Well, of course, I'm going to be honest with you. But those things are just sometimes missed. Those will be things when you get to funding, if, in fact, you're dealing with a lender that does